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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Alberta M Seamon,

10 Plaintiff,

11 v.

12 Navajo Nation Gaming Enterprise, et al.,

13 Defendants.
14

No. CV-23-08523-PCT-MTL

ORDER

15 Before the Court is Defendants Navajo Nation Gaming Enterprise (“NNGE”) and
16 Colleen Davis’s Motion to Dismiss. (Doc. 18.) Because NNGE is immune from Plaintiff
17 Alberta Seamon’s claims as an arm of the Navajo Nation, and because Ms. Davis cannot
18 be held individually liable under Title VII of the Civil Rights Act or Title I of the
19 Americans with Disabilities Act (“ADA”), the Court will grant the Motion.

20 **I.**

21 Ms. Seamon, pro se, is a member of the Diné Nation, also known as the Navajo
22 Nation. (Doc. 9 at 2.) She was employed by NNGE as an administrative assistant at the
23 Twin Arrows Casino and Resort. (*Id.*) She was terminated after approximately four
24 months. (*Id.*)

25 Ms. Seamon alleges that she was wrongfully terminated and seeks money damages.
26 (*See generally* Doc. 9.) She claims that Defendants violated her rights, discriminated
27 against her based on “race, religion, national origin, and disability (epileptic seizure),” and
28 created a hostile work environment. (*Id.* at 2.) Ms. Seamon says that the hostile work

1 environment exacerbated her disability. (*Id.*) She specifically accuses Ms. Davis, an NNGE
 2 employee at the Twin Arrows Casino and Resort, of “harass[ing] and bull[ying her]
 3 whenever she spoke her Indigenous language or shared her Diné culture with guests.” (*Id.*)

4 Ms. Seamon states that she brings claims “of employment discrimination,
 5 harassment, and wrongful termination under federal and state laws.” (*Id.* at 1.) But she does
 6 not specify what these laws are. Viewing her allegations liberally and wholistically, the
 7 Court takes Ms. Seamon to allege violations of Title VII of the Civil Rights Act and Title
 8 I of the ADA. (*See generally* Doc. 9.)

9 Defendants move to dismiss Ms. Seamon’s Amended Complaint under Federal
 10 Rules of Civil Procedure 12(b)(1) and 12(b)(6). (*Id.*) Because the Court finds that it lacks
 11 subject matter jurisdiction over this case as NNGE is immune from Ms. Seamon’s claims
 12 and there is no individual liability under Title VII of the Civil Rights Act or Title I of the
 13 ADA, it does not reach Defendants’ arguments brought pursuant to Rule 12(b)(6).

14 II.

15 Federal Rule of Civil Procedure 12(b)(1) authorizes a court to dismiss claims over
 16 which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A Rule 12(b)(1)
 17 challenge may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). When
 18 a defendant argues that the claims in the complaint, even if true, are insufficient to establish
 19 subject matter jurisdiction, the challenge is a facial one. *Safe Air for Everyone v. Meyer*,
 20 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial challenge to subject matter jurisdiction
 21 under Rule 12(b)(1), courts must accept all material allegations in the complaint as true
 22 and construe the complaint in favor of the plaintiff. *White*, 227 F.3d at 1242. “By contrast,
 23 in a factual attack [to subject matter jurisdiction], the challenger disputes the truth of the
 24 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Safe Air for*
 25 *Everyone*, 373 F.3d at 1039. Courts may look beyond the complaint only when a defendant
 26 brings a factual attack against jurisdiction. *White*, 227 F.3d at 1242. In that instance, the
 27 court “also need not presume the truthfulness of the plaintiffs’ allegations.” *Id.* Here,
 28 Defendants’ challenge is facial. (*See generally* Doc. 18.)

1 Because Ms. Seamon is pro se, the Court liberally construes the allegations in her
 2 Amended Complaint. *Capp v. Cnty. of San Diego*, 940 F.3d 1046, 1052 (9th Cir. 2019)
 3 (“We have emphasized that pro se pleadings . . . are to be liberally construed on a motion
 4 to dismiss.”).

5 III.

6 “Indian tribes have long been recognized as possessing the common-law immunity
 7 from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436
 8 U.S. 49, 58 (1978). Relevant here, that immunity extends to claims brought under Title VII
 9 of the Civil Rights Act and Title I of the ADA. *See* 42 U.S.C. § 2000e(b) (exempting
 10 “Indian tribe[s]” from the definition of “employer” under Title VII of the Civil Rights Act);
 11 42 U.S.C. § 12111(5)(b)(i) (exempting “Indian tribe[s]” from the definition of “employer”
 12 under Title I of the ADA).

13 “Tribal sovereign immunity not only protects tribes themselves, but also extends to
 14 arms of the tribe acting on behalf of the tribe.” *White v. Univ. of Cal.*, 765 F.3d 1010, 1025
 15 (9th Cir. 2014). The Ninth Circuit has identified five factors that courts must consider in
 16 determining whether an entity is an “arm of the tribe” and therefore entitled to share in the
 17 tribe’s immunity:

18 (1) the method of creation of the economic entities; (2) their
 19 purpose; (3) their structure, ownership, and management,
 20 including the amount of control the tribe has over the entities;
 21 (4) the tribe’s intent with respect to the sharing of its sovereign
 22 immunity; and (5) the financial relationship between the tribe
 23 and the entities.

24 *Id.* (internal marks and citation removed).

25 If the Court determines that NNGE is an arm of the Navajo Nation, it is entitled to
 26 immunity from Ms. Seamon’s claims unless the Navajo Nation has waived that immunity.
 27 *See Tsosie v. N.T.U.A. Wireless LLC*, No. CV-23-00105-PHX-DGC, 2023 WL 4205127,
 28 at *2 (D. Ariz. June 27, 2023).

A.

The first factor supports recognizing NNGE as an arm of the Navajo Nation as
 NNGE was organized under Navajo law and is a wholly owned subsidiary of the Navajo

1 Nation. 5 N.N.C. §§ 1701 (establishing NNGE), 1702(A) (stating that NNGE is “wholly
 2 owned by the Navajo Nation”). “District courts in this circuit have recognized that
 3 subsidiaries that are wholly owned by an Indian tribe or an arm of the tribe enjoy tribal
 4 immunity.” *Tsosie*, 2023 WL 4205127, at *2; *see also Dine Citizens Against Ruining Our*
 5 *Env’t v. Bureau of Indian Affs.*, 932 F.3d 843, 856 (9th Cir. 2019) (recognizing that the
 6 Navajo Transitional Energy Company was an arm of the Navajo Nation in part because it
 7 was organized under Navajo law and wholly owned by the Navajo Nation).

8 **B.**

9 Similarly, the second factor weighs in favor of NNGE’s position because NNGE
 10 was created “to conduct gaming operations within the Navajo Nation under the auspices of
 11 the Indian Gaming Regulatory Act of 1988 . . . , Navajo Gaming Ordinance . . . and the
 12 gaming compacts entered into between the Navajo Nation and any State.” 5
 13 N.N.C. § 1703(A). Its purpose is also to “generate gaming revenues and provide a fair
 14 return to the Navajo Nation.” *Id.* § 1703(B). The Ninth Circuit has previously recognized
 15 such an arrangement as suggesting that the entity is an arm of the tribe. *See Allen v. Gold*
 16 *Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (recognizing the defendant casino
 17 as an arm of the Tyme Maidu Tribe in part because it was created to conduct gaming on
 18 behalf of the tribe).

19 **C.**

20 The third factor also supports NNGE’s recognition as an arm of the tribe. NNGE is
 21 closely controlled by the Navajo Nation. *See generally* 5 N.N.C. §§ 1701-19. It is subject
 22 to the Navajo Nation Council’s legislative oversight. *Id.* § 1718. Its board of directors
 23 manages its internal operations on behalf of the Navajo Nation Council. *Id.* § 1707(A).
 24 That board consists of nine members, a majority of whom must be enrolled members of
 25 the Navajo Nation. *Id.* § 1707(B), (D). Finally, its board members must be confirmed by
 26 the Navajo Nation Council. *Id.* § 1707(C). These circumstances further indicate that NNGE
 27 is an arm of the Navajo Nation. *See Cook v. AVI Casino Enters.*, 548 F.3d 718, 726 (9th
 28 Cir. 2008) (finding that the defendant casino was an arm of the Fort Mojave Tribe in part

1 because a majority of its board of directors must be tribe members and the tribe counsel
2 performed corporate shareholder functions for the benefit of the tribe).

3 **D.**

4 The fourth factor also weighs in NNGE's favor. The Navajo Nation has expressly
5 extended its sovereign immunity to NNGE. 5 N.N.C. § 1702(C) ("As a legal entity of the
6 Navajo Nation, the [Navajo Nation Gaming] Enterprise is entitled to the privileges and
7 immunities of the Navajo Nation. The Enterprise shall possess all of the attributes of
8 Navajo sovereignty, including but not limited to immunity from suit . . ."). Moreover, the
9 Navajo Nation Sovereign Immunity Act, passed by the Navajo Nation Council, states that
10 the Navajo Nation is a sovereign nation immune from suit and includes NNGE within the
11 definition of the "Navajo Nation." 1 N.N.C. §§ 552(Q), 553(A).

12 **E.**

13 Lastly, the fifth factor likewise indicates that NNGE is an arm of the Navajo Nation.
14 NNGE and the Navajo Nation share close financial ties. All of NNGE's net gaming
15 revenues are distributed to the Navajo Nation to be used: "(1) to fund tribal government
16 operations and/or programs; (2) to provide for the general welfare of the tribe and its
17 members; (3) to promote tribal economic development; (4) to donate to charitable
18 organizations; and/or (5) to help fund operations of local government agencies." 12
19 N.N.C. § 2202 (cleaned up); *see also* 5 N.N.C. § 2005. The fact that "the economic benefits
20 produced by the casino inure to the [Navajo Nation's] benefit" further suggests that NNGE
21 is an arm of the Navajo Nation. *Cook*, 548 F.3d at 726.

22 All five *White* factors favor NNGE's position. Accordingly, the Court finds that
23 NNGE is an arm of the Navajo Nation and entitled to sovereign immunity.

24 **IV.**

25 Ms. Seamon does not deny that NNGE is an arm of the Navajo Nation. Instead, she
26 states that "[w]hile NNGE may assert sovereign immunity as an arm of the Navajo Nation,
27 such immunity should not shield them from accountability for alleged discriminatory
28 practices and a hostile work environment. The circumstances of this case warrant

1 consideration beyond the blanket application of sovereign immunity.” (Doc. 22 at 1.)

2 It is unclear what Ms. Seamon means by “the circumstances of this case.” The Court
3 takes her to argue that NNGE has waived its sovereign immunity with respect to her claims.
4 NNGE may indeed waive its immunity, but to do so the waiver must “be approved by the
5 [board of directors] by a duly adopted resolution.” 5 N.N.C. § 1705(F). Ms. Seamon has
6 not alleged that any such resolution has been passed. To the contrary, at oral argument she
7 confirmed that none has.

8 V.

9 Finally, Ms. Seamon’s claim against Ms. Davis fails. The Ninth Circuit held that
10 there is no individual liability under Title VII of the Civil Rights Act in *Miller v. Maxwell’s*
11 *International Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993) (“[T]his court’s ruling in *Padway*
12 [v. *Palches*, 665 F.2d 965 (9th Cir. 1982)] that individual defendants cannot be held liable
13 for damages under Title VII is good law.”). And “[b]ecause Title I of the ADA adopts a
14 definition of ‘employer’ and a remedial scheme that is identical to Title VII, [the] bar on
15 suits against individual defendants also applies to suits brought under Title I of the ADA.”
16 *Walsh v. Nev. Dep’t of Hum. Res.*, 471 F.3d 1033, 1038 (9th Cir. 2006) (cleaned up); *see*
17 *also Purcell v. Am. Legion*, 44 F. Supp. 3d 1051, 1056 (E.D. Wash. 2014) (“Numerous
18 courts, including the Ninth Circuit, have held that there is no individual liability for ADA
19 violations.”).

20 VI.

21 Ms. Seamon’s Amended Complaint must be dismissed because her claims fail as a
22 matter of law. Moreover, these fatal defects cannot be cured, and thus, the Court will not
23 grant her leave to amend. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007
24 (9th Cir. 2009) as amended (Feb. 10, 2009) (noting that the Court may deny leave to amend
25 where amendment would be futile).

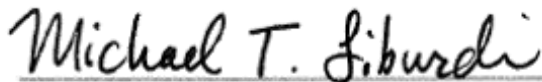
26 Accordingly,

27 **IT IS ORDERED** that Defendants Navajo Nation Gaming Enterprise and Colleen
28 Davis’s Motion to Dismiss (Doc. 18) is **granted**.

1 **IT IS FURTHER ORDERED** that Ms. Seamon's Amended Complaint (Doc. 9) is
2 **dismissed with prejudice.**

3 **IT IS FINALLY ORDERED** that the Clerk of Court shall enter judgment in
4 Defendants Navajo Nation Gaming Enterprise and Colleen Davis's favor and close this
5 case.

6 Dated this 26th day of June, 2024.

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10 Michael T. Liburdi
11 United States District Judge
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